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CONFIDENTIAL SETTLEMENT COMMUNICATION

May 24, 2016

Juan M. Fajardo
Assistant Regional Counsel
New Jersey Superfund Branch
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, New York 10007-1866

Re: Lower Passaic River/OU-2 Remedial Design: Statement of Work Issues

Dear Juan:

As noted in my prior letter to you of May 17, 2016, this letter provides a partial list of unanswered questions from the May 12th OU-2 Remedial Design Statement of Work ("SOW") meeting held at U.S. EPA Region 2's offices with my clients: Occidental Chemical Corporation ("OxyChem"), Maxus Energy Corporation ("Maxus"), and Tierra Solutions, Inc. ("Tierra").

Based on our discussions during that meeting, we understand that Region 2 is willing to provide additional information on the following topics. Note that this list is not an exhaustive list of the open issues. It does not include a number of important issues we anticipate will be discussed in future negotiations. Rather, it reflects our sense of the topics for which Region 2 could provide near-term information that would assist us in preparation of our initial comments to the draft SOW.

1. **SOW Section 1.4 - Performance Standards**

- a) Will Region 2 allow the Remedial Design Performing Party(ies) ("Performing Party") to participate in the development of the Performance Standards?
- b) How will Region 2 account for and recover the costs it incurs for the development of the Performance Standards?

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2. **SOW Section 3.2(b)(6) – Pre-Design Investigation Modeling Analysis**

- a) Does Region 2 have an expectation for which model(s) would be used during the Pre-Design Investigation?
- b) If so, please specify which model(s).
- c) If not, will the Performing Party have an opportunity to propose a model(s)?

3. **SOW Section 3.3(e) – Remedial Design Work Plan Modelling**

- a) Does Region 2 have an expectation for which model would be used during the Remedial Design?
- b) If so, please specify which model(s).
- c) If not, will the Performing Party have an opportunity to propose a model(s)?

4. **SOW Section 3.3(g) – Navigational Dredging/Work Plan for Congressional Deauthorization**

- a) Does Region 2 consider the requested actions, and costs incurred, related to this effort consistent with CERCLA and the National Contingency Plan?
- b) Why is Region 2 requiring the Performing Party to undertake this action as a Statement of Work Item?
- c) How does Region 2 intend to address the reality that the Performing Party will have no control over the actions and timeframes necessary to accomplish this task?
- d) Is Region 2 willing to agree that the Performing Party will not be at risk of stipulated penalties if this work is not completed within the required time schedules?
- e) Does EPA have an estimate or expectation of the time period necessary to accomplish the requested channel deauthorization?

CONFIDENTIAL SETTLEMENT COMMUNICATION**5. SOW Section 3.5 – Sediment Processing Facility Site Selection**

- a) From our discussions during our May 12th meeting, it is our understanding that Region 2 expects the Performing Party to develop a Site Selection Plan which, when implemented, will result in the development of a short-list of potential site locations which could be purchased/leased for siting the Sediment Processing Facility during the Remedial Action. Is our understanding correct?
- b) How does Region 2 intend to address our concern that, given the current scarcity of suitable locations within the Lower 8 Mile Study Area, it is likely that each such short-listed site location will require unique design and engineering plans?
- c) If our understanding in this regard is incorrect, please advise us of Region 2's thoughts regarding this requirement and in general terms the actions Region 2 envisions will be required to achieve compliance with this particular requirement.

6. SOW Section 5.5 - Certification of Deliverables

- a) How broadly will Region 2 apply this requirement?
- b) What specific documents will Region 2 require this certification?

7. Remedial Design Performance Standards/Dispute Resolution

- a) Why are the Remedial Design Performance Standards not subject to dispute resolution?

On one final note, as you, Sarah Flanagan and I discussed yesterday, we would like to have further discussion regarding the status of information and communications to be exchanged between my clients and Region 2 during our negotiations regarding the draft AOC and SOW for the remedial design. As we have discussed, certain other parties have already misused correspondence between Region 2 and my clients to inaccurately suggest that Region 2 had made determinations regarding the relative liabilities of parties or financial responsibility for the remedial design. For documents that will be made public in response to FOIA requests, the prospect of potential future litigation between my clients and other parties responsible for the LPRSA will mandate careful scrutiny to ensure that no such

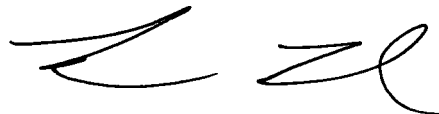
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communications could be used against my clients in litigation, adding further difficulties to the negotiation process.

While my clients recognize that Region 2 has certain obligations under the Freedom of Information Act, in our experience communications associated with settlement negotiations of this nature are often treated as confidential settlement communications not subject to FOIA, and for good reason. Ensuring that our communications with Region 2 are not amenable to being taken out of context and misused by other parties will make negotiations more cumbersome, increase related transaction costs, and may lead to miscommunications during negotiations. While we recognize the need to keep negotiations moving and have provided this letter notwithstanding the open issues on this point, we believe that further discussion of the status of materials exchanged during settlement negotiations is important.

We would appreciate a response to these items at your earliest convenience, which will allow us to finalize our initial response to the draft SOW. Thank you for your consideration of these requests. Please do not hesitate to contact me at any time should you have any questions; I am available to discuss this letter at your convenience.

Very truly yours,

A handwritten signature in black ink, appearing to read 'B. Lippard', with a stylized flourish at the end.

Benjamin S. Lippard

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cc: Nicoletta M. DiForte, USEPA
Sarah P. Flannigan, USEPA
Brian Donohue, USDOJ
Laura J. Rowley, USDOJ

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U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, New York 10007-1866

Re: Lower Passaic River Remedial Design

Dear Juan:

This letter responds to Nicoletta Di Forte's letter of April 26, 2016.

First, on behalf of my clients Occidental Chemical Corporation ("OxyChem"), Maxus Energy Corporation ("Maxus"), and Tierra Solutions, Inc. ("Tierra"), I wanted to thank you for Region 2's meetings with us on May 12, 2016, which we had requested in our letter of May 3, 2016 to address several discrete topics: (1) the draft Statement of Work ("SOW"), (2) our efforts to convene a small group of responsible parties to fund the remedial design, and (3) the draft Remedial Design Administrative Settlement and Order on Consent ("RD AOC"). These discussions were constructive and helped inform our decision in moving forward. As we also discussed, however, we continue to have many serious concerns with the draft RD AOC, the draft SOW, and related issues.

Based on our understanding of Region 2's expectations for a response to its April 26 letter, please be advised that my clients are willing to enter good faith RD AOC negotiations with Region 2. The success of such negotiations will depend, in part, on whether my clients and Region 2 can reach a satisfactory and mutually acceptable resolution of my clients' principal concerns—some of which have already been shared with you during the technical and legal meetings held last week in your offices—during the course of future discussions.

By agreeing to enter such negotiations my clients do not admit any liability or waive any legal claims or defenses regarding any issue whatsoever—including alleged liability for

Vinson & Elkins LLP Attorneys at Law
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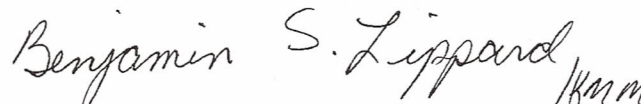
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performance of the remedial design, the validity of the ROD, Region 2's authority to enforce the ROD, or any other issue—and reserve their rights to assert all such claims or defenses in any future proceedings. Moreover, my clients also reserve all rights to pursue claims against potentially responsible parties for hazardous substances found within the Diamond Alkali Superfund Site, including without limitation the eight contaminants of concern identified in the OU-2 ROD.

As you requested, we wanted to keep you up-to-date on our efforts to contact other responsible parties regarding the remedial design program. As we explained last week, we are working to assemble a small group to assist in funding the remedial design program, focusing on the major parties responsible for each of the eight contaminants of concern identified in the ROD. We wrote CPG's Coordinating Counsel, William Hyatt, on April 29, 2016, to determine whether CPG members were willing to speak with us. By letter dated May 4, 2016, Mr. Hyatt advised us that he does not represent CPG members in connection with the remedial design and was not authorized to discuss those issues. Accordingly, on May 9, 2016 we wrote a group of approximately 20 parties requesting that they attend a meeting in New York City on May 13, 2016, to discuss the remedial design. Representatives of five companies attended. We are continuing our efforts to work with these and other parties; we will keep you updated regarding these efforts.

To move the process forward, I will be sending you a follow-up letter shortly, identifying the issues where, based on our discussion last week, Region 2 had agreed to provide additional information to answer certain questions. After you have had a chance to review that letter, I am available to discuss next steps and the process going forward.

Very truly yours,


Benjamin S. Lippard

cc: Nicoletta DiForte, USEPA
Sarah Flannigan, USEPA
Brian Donohue, USDOJ
Laura Rowley, USDOJ